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JAMES D. MAHER
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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 49.

IN THE MATTER OF THE APPLICATION

OF THE

LONG SAULT DEVELOPMENT COMPANY,
Plaintiff in Error,

against

HOMER D. CALL (as Successor of John J. Kennedy), as Treasurer of the State of New York,
Defendant in Error.

Supplemental Brief in Behalf of the Plaintiff in Error on the Subject of the Jurisdiction of the Court.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

In the Matter of the Application of the LONG SAULT DEVELOPMENT COMPANY, Plaintiff-in-error, vs. HOMER D. CALL (as successor of John J. Kennedy) as Treasurer of the State of New York, Defendant-in-error.	No. 49. In Error to the Supreme Court of the State of New York.

SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR ON THE SUBJECT OF THE JURISDICTION OF THE COURT.

In view of the discussion upon the former argument of the question as to whether, upon the record here presented, a Federal question was involved giving this court jurisdiction, we desire to re-state the position of the plaintiff in error.

1. The contract clause of the Constitution is aimed primarily at *legislation* and not at *judicial decisions;* and jurisdiction always depends, irrespective of what the State court has de-

cided, upon these questions: First, whether there is a contract, and second, whether subsequent legislation, either directly or indirectly, has impaired its obligation.

A. Practically this court is always confronted with this dilemma:

If the decision of the State court has correctly held that there is no contract, there is no jurisdiction; if, on the other hand, the decision of the State court is incorrect, then only need the question of impairment be considered.

Jurisdiction, therefore, is predicated primarily upon the *incorrectness* of the State Court's decision. This court, therefore, has always determined preliminarily whether a contract exists or is valid; and this has always been done independently of the decision of the State Court; for otherwise it would be possible for a state court to avoid a review of its decision as to the validity of a contract by omitting any reference to a later statute purporting to impair its obligation. It has been repeatedly said by this court that it would not permit a state court thus to determine the limits of the Federal jurisdiction.

We submit, therefore, in the case at bar, that upon the question whether it has jurisdiction, this court should consider, independently of the decision of the Court of Appeals, first, whether the act of 1907 constituted a contract, and, second, whether there has been an impairment of its obligation by the acts of 1913. Such consideration is necessarily preliminary; it cannot be final upon the merits; and this appears from the fact that the court has not infrequently taken jurisdiction and then rendered judgment on the merits that there was no contract or that it had not been impaired by later legislation.

In *Bridge Proprietors vs. Hoboken Company*, 1 Wall., 116, the legislature of the state of New Jersey in 1790 gave power to certain commissioners to contract with persons to build a bridge across the Hackensack River, and provided that it should not be lawful for any person whatsoever to erect "any other bridge over or across the said river for ninety-nine years." In 1860 authority was given by the legislature to the Hoboken Land and Improvement Company to construct a railroad from Newark to Hoboken and to build a viaduct over the Hackensack River. It was claimed that

there was no Federal jurisdiction because the state court did nothing more than construe the act of 1860. This court said:

> "But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was *not** construed. No doubt is entertained by this court, none could have been entertained by the State court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. *It was then the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid.*"

The Court having first held that the act of 1790 and the proceedings under it constituted a contract, was "next led, in the natural order of investigation, to inquire if the contract of the State forbids the erection of such a structure as the defendants were authorized to erect, and which they proposed to erect under the act of 1860." The court decided that the act of 1860 had no such effect and therefore the judgment was affirmed. *But it is to be noted that jurisdiction was taken.*

In *Wright vs. Nagle*, 101 U. S., 791 (October, 1879), under the provisions of the laws of Georgia, certain courts were authorized to grant franchises for the establishment and main-

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*NOTE.—Italics used by court. Except where otherwise indicated, the italics in the text of opinions quoted are our own.

tenance of toll bridges over rivers at a highway crossing. Such a franchise was granted. Subsequently, the Commissioner of Roads and Revenue authorized the defendants to erect a toll bridge across the river within the limits covered exclusively by the original grant. It was claimed that by making the second grant the Board of Commissioners "had exercised legislative powers conferred upon it by the laws of the state" and that it was an infringement of the earlier grant. Upon a motion to dismiss because no federal question was involved, this court said:

> "It is true, the court below disposed of the case by deciding that the State statutes did not authorize the inferior court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave a construction to a State statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is when the State court 'has been called upon to interpret the contracts of States, though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with State legislation.' Citing *Jefferson Branch Bank vs. Skelly*, 1 Black, 436 * * *. The complainants claim they have such a grant through the agency of the inferior court, acting under the authority of the legislature. This is denied, because, as is insisted, the legislature has not given the court power to make an exclusive grant. That was the precise question decided below, and under the exception to the rule just stated is reviewable here."

The court having taken jurisdiction on the theory that it was not bound by the decision of the state court in holding that there was no power to make the exclusive grant, reached the conclusion on considering the merits that the state court was right.

In *Louisiana Railway & Navigation Company vs. New Orleans*, 235 U. S., 164 (November, 1914), suit was brought by the city to restrain the Louisiana Railway and Navigation

Company from proceeding, under an ordinance of September 4, 1903, to construct and operate a belt line. In 1903 an ordinance gave a right-of-way to the New Orleans and San Francisco Railroad Company, over the same line, on the condition that it should construct and dedicate to public use, tracks from the end of a constructed part of the belt line to Henderson Street. The San Francisco Railroad Company abandoned the building of the line. On September 4, 1903, an ordinance was passed reciting the agreement with the San Francisco road and granting to the plaintiff in error a right-of-way over the lines to be completed by the San Francisco road, provided that, after operating upon them for thirty days, it should pay to the city the sum of $50,000, and providing further that if the San Francisco road "without legal excuse" failed to build the road, the plaintiff in error should build it in lieu of the payment of the $50,000. The belt lines when so built were " ' to be turned over to the immediate ownership of the city of New Orleans' and to be under 'the control and management of the public belt authority' ". This ordinance was accepted by the plaintiff in error. A further ordinance was passed in October 1904, repealing all conflicting ordinances, which (as the Court said), "if enforced, would make it impossible for the plaintiff in error to exercise the rights it might otherwise have under" the ordinance of 1903.

The city alleged the invalidity of the ordinance of September 4, 1903, and the State court held that it was "illegal, void and of no effect." This court held, however, that it was not deprived of jurisdiction, merely "*because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative.*" The court added:

> "*In such a case this court must determine for itself whether there is an existing contract.* Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee."

But having on these grounds taken jurisdiction the court affirmed the judgment on the ground that the decision of the State court was correct that the plaintiff in error had no contract rights under the ordinance of 1903.

In *Terre Haute and Indianapolis Railroad Company vs. Indiana*, 194 U. S., 579 (May, 1904), there was a provision in the special charter of a railroad company that the legislature might so regulate the tolls that not more than a certain percentage should be divided as profits among the stockholders, and that the surplus should be paid over to the State Treasurer for the use of schools. The company surrendered the special charter and accepted a new one without the provision referred to. It was attempted to revive the liability under its surrendered charter under the provisions of a general railroad law that all liabilities to the state, whether inchoate or complete, under any special charter, should be reserved " notwithstanding the past or future acceptance of the surrender of such special charters." This court held that the decision of the Supreme Court of Indiana had given force to this later legislation and took jurisdiction. The court said :

> " The case then stands thus : The state court has sustained a result which cannot be reached, *except on what we deem a wrong construction of the charter*, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, *because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment.* To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

McCullough vs. Virginia, 172 U. S., 102, is another important case upon the present point. It was one of the Virginia coupon cases, and the plaintiff, under an act of the legislature of the State of Virginia, passed in 1871, tendered coupons of state bonds in payment of taxes, and they were

refused. The Virginia Court of Appeals had decided that it was beyond the powers of the legislature by the act referred to to require the state to accept coupons for taxes. It was claimed that there was no federal jurisdiction because the Court of Appeals had not considered in its opinion any of the subsequent legislation of the state, passed, as it was claimed, with a view of impairing the contract obligation created by the act of 1871. The court, however, held that the judgment gave effect to subsequent statutes. The court said :

* * * * * * *

" It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision."

"* * * can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made."

The court continued (page 122) :

" True, in its opinion, the Court of Appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the State. Now, it is one of the duties cast upon this court by the Constitution and

> laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

This decision receives significance both from the reasoning of the court in the prevailing opinion and from the vigor of Judge PECKHAM'S dissent and his statement of the reasons which led him to a conclusion contrary to that held by the majority of the court.

In *Carondelet Canal and Navigation Company vs. State of Louisiana*, 233 U. S., 362 (April, 1914), the State of Louisiana sued to recover from the Canal Company a waterway and its appurtenances near New Orleans. By several acts of the legislature the company had received a charter existence for fifty years, at the end of which period its canal property was to be surrendered to the state. The fifty years were to expire in 1908, and in 1906 the legislature passed an act creating a Board of Control to take over the property. Upon the proceedings taken by that board the company refused to comply with the demand for delivery of the canal on the grounds, (1) that the state had not complied with a contract obligation of the State to make compensation, claimed to exist under the acts constituting its charter, and (2) that if the act of 1906 authorized a Board of Control to take possession without such compensation, it violated the contract clause of the Federal constitution. The state's answer was that the provisions of the act of 1858 relied upon were void because they violated the provision of the Constitution of the State which prohibited the granting of aid by the state to companies formed for the purpose of erecting works of public improvement.

It was contended by the attorney general of the state, upon a motion to dismiss for want of jurisdiction on the ground that no federal question was presented, that (opinion of the Court, p. 376), the state court

> "did not consider or give any effect to the act of 1906 but considered only the act of 1858 and decided that

the canal company did not acquire the rights under it which the company contends for. *In other words, decided that the act of 1858 gave no rights which the State did not already have and which it was entitled to possess upon the expiration of the charter of the canal company.* There is, as we have said, strength in the contention, but, of course, the fact that the Supreme Court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company and a legislative provision against the obligation of the contract, and was an essential, although unmentioned, element of the decision under review, it is a basis for the Federal question set up."

The court took jurisdiction and reversed the judgment of the state court.

See, also, *Chicago, &c., R. R. Co. vs. Nebraska*, 170 U. S., 57; *Houston and Texas Central Railroad Co. vs. Texas*, 177 U. S., 66; *University vs. Peter*, 99 U. S., 309; *Atlantic Coast Line vs. Goldsboro*, 232 U. S., 548.

In view of the foregoing decisions, it is not surprising, that a search of the decisions has not disclosed a case where subsequent legislation has been aimed directly at the *validity* of an earlier legislative contract in which this court has not taken jurisdiction, even where the state court, ignoring the subsequent legislation, has held that the earlier legislative contract was beyond the power of the state.

B. In most cases the question of jurisdiction has turned wholly on the inquiry whether the later legislation has had the effect of impairing the earlier statutory contract, and that question is, of course, involved in the case at bar. Upon that point it has generally been assumed that legislation *purporting* to affect the existence or validity of a contract was sufficient under the contract clause of the constitution to vest jurisdiction. Whether or not the legislation has actually had that effect has been considered on the merits after jurisdiction has been taken. Where, as in the case at bar, a subsequent statute in terms repeals an earlier statutory contract, it would

seem absurd that this court should decline jurisdiction merely because the state court has based its conclusion on a ground which involved the conclusion that the action of the state legislature was superfluous. In the *Carondelet Canal and Navigation* case, the court said that "The repeal of a law which constitutes a legislative contract is an impairment of its obligation", and quoted 2 Story on the Constitution, Sec. 1386, to the effect that the contract clause prohibition was directed against, "exertions of sovereignty * * * whether boldly declared in an explicit law or disguised in an ambiguous form. * * * The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to have made such enumeration, since it might have been defective."

It is, perhaps, not too broad a generalization to say that, where the *validity* of a legislative contract is involved, and not merely its *interpretation*, and subsequent legislation in terms repeals it or assails its validity, this Court first considers whether the contract exists, and then for the purpose of determining its jurisdiction, *presumes* that effect has been given to the later legislation.

2. But without reference to the foregoing considerations we submit that the Court of Appeals, while in terms basing its decision on the invalidity of the Act of 1907, intended to and actually did give effect to the repealing acts of 1913.

Judge BARTLETT referred to the repeal as "The first obstacle" that confronted the plaintiff in error (fol. 122), and held it to be "*effective.*" But having first said that the repeal could not operate to confiscate any valid franchise existing under the act, he proceeded to consider whether any such franchises existed; and having reached the conclusion that they did not, a further discussion as to the effect of the Repealing Act would have been out of place. But the Chief Judge does not say, and it would be futile to contend, that the avowed purpose of the Repealing Act was not to deal with and to put an end to any property franchise that might exist. And, even if the *decision* of the Court of Appeals had taken no notice of this situation, this court on the question of jurisdiction will inquire whether the object of the litigation was to make the Repealing Act effective; and on that point the entire record shows that the State was determined to destroy *through*

legislation the franchises of the plaintiff-in-error. The efforts of the State authorities, executive and legislative, to accomplish that end were long continued and persistent; and the purpose to put an end not only to the corporate rights, but also to the property franchises is clearly expressed in the Repealing Act, and by unavoidable implication, as we have already said, the intention to accomplish that result was recognized by the Court when it said the repeal of the statute was "effective."

In the *Carondelet Canal and Navigation Company* case (*supra*) the fact that the repealing act was "treated as an important factor in the State's petition in both the *charging part and the prayer*" was adverted to as important on the question of jurisdiction. In *Wright vs. Nagle* (*supra*) the Court said: "If the Court erred in construing the statute, and in holding that there was no contract, then the question is directly presented by the *pleadings and the stipulation as to the facts*, whether the subsequent action of the commissioners of roads and revenue is, in its legal effect, equivalent to a law of the State impairing the obligation of the contract as it was made. In this way, it seems to us, a Federal question is raised upon the record, which gives us jurisdiction." In *Chicago, &c., Railroad vs. Nebraska* (*supra*) the court sustained its jurisdiction not so much upon the fact (which was not very clear on the record) that the state court gave effect to the subsequent legislation, as upon the circumstance that it had been claimed by counsel in the state court that the subsequent legislative act had impaired the earlier obligation. In *Louisiana Railway & Navigation Co. vs. New Orleans* (*supra*), although the state court had based its decision solely upon the ground that the earlier contract "was not made, or that it was invalid, or that it has become inoperative," the court held that it was to determine for itself whether there was a contract. "Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee"; and the court then considered the fact that it "was *the whole object of the suit*" to "establish the right of the city to carry out the subsequent ordinance." That was said to appear "from the *petition itself*" and the protec-

tion sought by the city was "completed and made permanent" by the *judgment*. In *Terre Haute & Md. R. R. Co. vs. Indiana* (*supra*), the court referred to the fact that the State court gave force to the later statute "in terms as providing a remedy."

The application in the case at bar was for a writ of mandamus to compel the State Treasurer to accept $25,000 from the plaintiff in error on the ground that his refusal to do so has created a cloud upon its title to the franchises granted by the Act of 1907. The propriety of this remedy has been sustained by the State Courts. It was averred in the petition for the writ (fol. 36), that if the act of 1907 was repealed, as the Governor and Attorney General at that time advised, the petitioner would be "irrevocably injured." The inchoate character of the rights was then referred to, and it was averred that by reason of the attitude of the State authorities, and the cloud created thereby, it would be impossible to obtain the assent of Congress and the Federal authorities to the construction of the dam; and when the Repealing Act was afterward passed the anticipated damage on that account was fully realized, since Federal authority would, of course, never have been given to build a dam across a navigable river to an applicant whose corporate charter had been taken away, and whose property franchises had been declared to be void by the legislature that granted them.

When the petition for the writ was filed the effort to annul the franchises of the plaintiff in error had already been commenced by the State authorities. The Attorney General had advised the State Treasurer not to take the $25,000 on the ground that the Act of 1907 was void. The State Senate had asked the Attorney General for his opinion, and having received it, had introduced a bill to repeal the Act of 1907 as unconstitutional on the grounds stated by the Attorney General. So far as the invalidity of these acts could be raised, it was urged in the petition of the plaintiff in error. The state authorities pressed the repealing legislation to passage, and it was enacted before the decision of the Appellate Division. That its validity and effect became a principal feature of the controversy is manifest from the opinions of the court; and that it continued to be the chief issue in the Court of Appeals is no less clear from the opinions of the judges,

since both the prevailing and the dissenting opinions refer to the repealing statutes and discuss their effect (See Judge BARTLETT's opinion, Record, fol. 122, and Judge COLLIN's opinion, fols. 124, 128, 140). Judge COLLIN said that it was a fundamental question whether if the act of 1907 was valid, Chapter 452 of the Laws of 1913 annulled "the rights and privileges of the corporation." He also held that the act of 1907 was valid and, therefore, that the rights and franchises granted by it "were held under the guaranties which protect other property and were not destroyed or confiscated through the appeal." He discussed and rejected the view taken by the Appellate Division as to the meaning and effect of the Repealing Act.

It is clear from this record that the State was unwilling to rely upon the invalidity of the act of 1907; for it not only pressed the Repealing Act to passage, but the Attorney General has ever since been urging the effect of the repeal upon the court as a ground for refusing the remedy sought by the plaintiff in error. The fact that Judge BARTLETT said as to the contentions on these points that "it is not necessary to discuss them if I am right in the conclusion which has been stated" (fol. 124), does not alter the fact that they were vigorously pressed; and, under the decisions above referred to, it is proper for this court to consider that fact, if, indeed, the course of the agents of the state, inincluding those in charge of the executive, judicial and legislative branches, do not themselves constitute subsequent legislation within the meaning of the Constitutional prohibition. See *Carondelet Canal Co. case, supra*, and the *Muhlker case, supra*.

In continuance of the effort to have effect given to the Repealing Act, the Attorney General even now urges that *this court* give it effect:

(*a*) By Point VII. of his Brief he takes issue with us on our contention that the Repealing Act was void because it was in violation of the Constitution of the State of New York;

(*b*) By Point VIII. he seeks to defeat the remedy of mandamus *by the claim that it was taken away by the Repealing Act.* He claims: (1) That the decision of the Court of Appeals

did not necessarily determine "That this proceeding for mandamus survived the Repealing Act;" and (2) that if this Court should find the Act of 1907 to be constitutional then "it becomes necessary to inquire whether any power in the company to pay $25,000 to the State Treasurer or any power in the State Treasurer to receive the moneys, *has survived certain other definite provisions of the Repealing Act* * * *." Thus his position is that the repeal of the corporate charter is valid, and that as a consequence "the company cannot take one step in continuance of or in preparation for the objects of its creation; and so, were mandamus granted, the company could not act, for there is no company to act, and no power surviving whereby it could pay into the State Treasury the $25,000."

The Attorney General further says:

> "In repealing the Long Sault bill the Legislature has enacted a special statute affecting only a special statute. There were no situations and rights unknown to it which it might have left to the General Construction Law to preserve. *The whole force of the Repealing Act was aimed at the Long Sault Development Company and its rights asserted or to be asserted in the courts. We perceive an intent to annihilate rather than to preserve any action brought while the statute was in force.*
>
> "It would be, moreover, somewhat absurd to consider the Legislature as desiring to preserve by the Repealing Act, or by the General Construction Law, rights or causes of action which it believes the company never lawfully possessed, because the entire charter, including all action under it, was unconstitutional."

And the Attorney General adds that no duty now rests on the State Treasurer to accept the $25,000 because "there is now no statute" under which he may receive it; hence he argues mandamus will not lie. Without discussing the merits of this proposition, it is at least plain that the Attorney General is seeking to have this court give effect to the Repealing Act, which would deprive the plaintiff in error of its

only available remedy to prevent an impairment of its contract rights.

Finally, Section 2 of Chapter 452, Laws of 1913, provides that the State Comptroller shall pay back to the plaintiff-in-error all sums paid by the Company into the State Treasury. By Chapter 453, Laws of 1913, the State consents "to have its liability determined" upon any claims "by reason of" the repeal, and empowers the board of claims to hear and determine them, but provides that they shall be allowed only on "such legal evidence as would establish a liability against an individual or corporation in a court of law or equity," and that the validity of the claims shall not be deemed to be conceded or any defense thereto waived. The decision of the Court of Appeals necessarily gives effect to all of these provision. The fact that some of them may be deemed to be *beneficial* to the plaintiff in error does not render them any the less an impairment of its Charter. They constitute an effort to give compensation for the destruction of contract rights against the will of the plaintiff-in-error. Where a subsequent act was claimed to impair an earlier contract by a provision favorable to the company which asserted the impairment, this court in *Houston & Texas Central Railroad Company vs. Texas, supra,* said: "Although that modification may be a favor to the company, it nevertheless gives effect to the act."

In this connection what has already been quoted in part from the opinion in *Carondelet Canal* case, *supra,* is pertinent, viz.:

> "The repeal of a law which constitutes a contract is an impairment of its obligation. 'It may be laid down, as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired.' 2 Story on the Constitution, Sec. 1391. The provision of the Constitution against the impairment of the obligation of contracts was intended 'to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be

impaired. It would have been unwise to have made such enumeration, since it might have been defective.' *Id.*, Sec. 1386. The precaution was necessary. The prohibition is directed against the exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form."

Even if, in spite of the foregoing considerations doubt remains as to the exact extent that the Repealing Act was brought into play by the decision of the Court of Appeals, the case is clearly one where, as in *Terre Haute & Indianapolis R. R. Co. vs. Indiana, supra*, the State court "put forward the untenable construction more than the unconstitutional statutes" and did "rely upon" the subsequent "legislation to some extent, but exactly how far is left obscure"; and under such circumstances, the court should take jurisdiction.

Under all these circumstances we submit that such effect has been given to the Repealing Act as to give to this court jurisdiction to consider the merits of the controversy.

3. Upon the previous argument it was suggested that where the existence and validity of a statutory contract were denied by a state court on the ground that there was no power in the legislature to make the contract, it would be only in a very clear case that this court would not follow the decision of the state court. If by this was meant that there is anything more than the ordinary presumption on appeal in favor of a judgment of the lower court, it is not in accord with the current of the decisions of this court, which has never failed, irrespective of the decision of the state court, to re-examine for itself the question of the *existence* and *validity* of a contract, when it is claimed that obligations arising under it have been impaired by state legislation. In *Butz vs. City of Muscatine*, 8 Wall., 584, it was said that cases in which the Supreme Court has thus taken jurisdiction have extended "in an unbroken series from an early period" to the present time, and it was added that the right under the contract clause of the Constitution could "no more be taken away by subsequent *judicial decisions* than by subsequent *legislation*. It is as much within the sphere of

our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other. We cannot in any other way give effect to the contract of the parties as we understand it."

Jefferson Branch of the State Bank of Ohio vs. Skelly, 1 Black, 436, came up from the Supreme Court of the State of Ohio on a writ of error to test the validity of a provision of the state Banking Act which limited the amount which banks organized under it were obliged to pay as taxes. The state court had reached the conclusion that the provision of the banking law did not constitute a contract. The Supreme Court was urged on account of decisions in the Ohio Supreme Court, to reconsider its decision in the *Piqua Branch Bank* case (16 How., 369), on the ground that the interpretation of the act by the state court should be accepted since it had construed "the constitution and laws of the state of Ohio differently from what both had been decided to be by the Supreme Court of the state and that the Supreme Court of the United States should follow or conform to the conclusion of the former * * *." To this the court said :

> "We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, *whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one*, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what

use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, *independently of all adjudication by the Supreme Court of a State*, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, *notwithstanding a contrary conclusion by the Supreme Court of a State?* It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion * * *."

In *Piqua Branch of the State Bank vs. Knoop*, 16 How., 369, where the court was urged to follow the decision of the state court, it said :

> " To follow the construction of a state court in such a case, would be to surrender one of the most important provisions in the federal constitution.
>
> There is no jurisdiction which we are called to exercise, of higher importance, nor one of deeper interest to the people of the States. It is, in the emphatic language of Chief Justice MARSHALL, a bill of rights to the people of the States, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the supreme court of the State command, we are called upon to exercise our own judgment in the case."

It is not necessary to multiply similar expressions of the court, since they have been numerous and uniform ; and the rule thus expressed had been repeatedly applied to contracts involving the exercise of sovereignty in relation to the most vital governmental functions of the several states :

In *Home of the Friendless vs. Rouse*, 8 Wall., 430, the power of any State to pass a statute forever exempting a corporation

from taxation was considered and upheld. *Washington University vs. Rouse*, 8 Wall., 439, involved the same question, and the decision receives significance from the fact that three of the justices dissented upon the ground that no state had the right to "bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society." *Douglas vs. Kentucky*, 168 U. S., 488, involved the legality of the lottery laws of Kentucky, and contrary to the decision of the state court the Supreme Court held that a lottery grant was not a contract within the protection of the Federal Constitution. Claim was made that contract rights had been acquired under the decisions of the highest court of the state of Kentucky, but this court said, "But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislature? Clearly not." *Delmas vs. Insurance Company*, 14 Wall., 661, involved the validity of a provision of the state constitution of Louisiana declaring notes of the Confederate states to be a valid consideration for contracts. In *Muhlker vs. New York and Harlem Railroad Company*, 197 U. S., 544, the court held that a decision of a state court reversing a previous judicial interpretation of statutes and the law of the state in relation to property rights would be regarded in the same light as subsequent legislation, and that "when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it;" and the court said that it was to determine for itself the "existence and extent of such contract." In *Humphrey vs. Pegues*, 16 Wall., 244, *Pacific Rail road Co. vs. McGuire*, 20 Wall., 42, *Louisville and Nashville R. R. Co. vs. Palmes*, 109 U. S., 244, and *Vicksburg, Shreveport & Pacific R. R. Co.*, 116 U. S., 665, the power of the legislature to exempt a railroad corporation from taxation was considered. *Stearns vs. Minnesota*, 179 U. S., 223, involved the validity of a contract made by statute for a gross earning tax levied upon a railroad company was considered. In *Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683, the validity of a municipal grant of an exclusive right to supply gas to a municipality by pipes laid in the streets was upheld as a contract and the court also considered whether there had been a

sufficient consideration for the grant. A similar question arose in *Citizens Street Railway vs. Detroit Railway*, 171 U. S., 53, in relation to the power of the state legislature to grant an exclusive right to a railroad company to use the streets. *New Orleans Gas Company vs. Louisiana Light Company*, 115 U. S., 650, involved a similar principle. See, also, *Freeport Water Company vs. Freeport City*, 180 U. S., 595; *Burgess vs. Seligman*, 107 U. S., 203.

It is clear, from this review of the decisions, that however closely a contract may involve state or general public policy, this court has not hesitated to consider its existence and validity, without reference to the decision of the state court. On the other hand, a brief reference to the cases where the court has refused to take jurisdiction because it has followed the decision of the state courts, will serve to show that they are of quite a different character:

In *Bacon vs. Texas*, 163 U. S., 207, a question of title to lands lying within the State of Texas was involved and was held to depend upon whether the plaintiff in error or his predecessors in the title had complied with the local land laws of Texas which required certain surveys to be made as a condition precedent to the vesting of the title. On this point, this court said: "If the court had decided that the survey actually made was a sufficient compliance with the act, but that defendants obtained no vested rights in the land by virtue of such survey, and that the act of 1883 was effectual in withdrawing such lands from market, that decision would have been reviewable here, and in that case this court would determine for itself what rights the parties obtained under the act of 1879, and whether by what they had done they had obtained any rights which could not be unfavorably affected by the act of 1883." In *Cross Lake Shooting Club vs. State of Louisiana*, 224 U. S., 632, the title to land was involved. The state court had decided that the plaintiff in error had never acquired title to the land "because the grant was not one *in præsenti* but depended upon conditions subsequent, which had never been fulfilled,"—a matter held to be local law. In *New Orleans Water Works vs. Louisiana Sugar Company*, 125 U. S., 18, the Court declined to reexamine a decision of the state court that within the terms of an excep-

tion in the legislative charter of the plaintiff in error the property of the defendant in error was "contiguous to the river." In *St. Paul, Minneapolis and Manitoba Railroad Company vs. Todd County*, 142 U. S., 282, the question involved was whether a certain class of property came within the terms of a statutory exemption. See, also, *Russell vs. Sebastian*, 233 U. S., 195, *Wilmington & Weldon R. R. Co. vs. Alsburg*, 146 U. S., 279, *Fisher vs. City of New Orleans*, 218 U. S., 438 and *M. & K. I. R. R. Company vs. Olathe*, 222 U. S., 187.

It will be found that in all of the above cases the existence and validity of a statutory contract was not so much involved as the construction of a state law under which it was made, or some question arising in its administration, or some point of local law affecting its interpretation. In the case at bar the infirmity of the grant was not asserted on any such grounds, but was expressly based by the court upon the broad proposition that the attempt on the part of the legislature was to make a grant which amounted to an "abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private corporation." And the court added: "The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest." This principle is, of course, of general application. It was applied by this court in *Illinois Central Railroad Company vs. Illinois*, 146 U. S., 387, to a grant of land under the waters of the Chicago harbor; and the decision in that case is the only precedent cited by the Court of Appeals in support of its conclusion. In the present case it appears from the record that prior to 1907 it had not been the policy of the state of New York to refuse to grant the right to build dams across navigable streams, even though they necessarily involved, to a certain extent, the interference with and control of navigation. And that the Act of 1907 could not have had the effect of turning over the control of navigation "wholly to the dominion of a private corporation," is also manifest from the fact the Federal Government in the exercise of its

dominant sovereignty had already, in a variety of ways by legislation and treaties, assumed effective control of the navigation of the St. Lawrence River. The state did not, therefore, by the Act of 1907, intend to part "for all time with its own power to improve such navigation" and such could not have been its effect.

From these considerations we submit that the decision of the Court of Appeals did not relate to a subject in respect of which questions of local law, or of settled rules of property, or of titles to land, were so involved that this court should hesitate to re-examine them.

4. We submit that a Federal question is involved herein of which this Court should take jurisdiction.

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No. [illegible] 49

FOREST, FISH AND GAME COMMISSION,
GEORGE P. DECKER,
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OPINION

IN RE

Constitutionality of the Grant to the Long Sault Development Company of Privileges, by Chapter 355, Laws of 1907, for Use of Waters and of Title to the Bed of the St. Lawrence River Under the Long Sault.

The question of the validity of this grant arises on consideration of the bill of Senator Burd to repeal the grant.

The Long Sault of the St. Lawrence constitutes both a state and national boundary and is a natural navigable stream, the channel, of common knowledge, having been long and extensively used for navigation. Chapter 355 of the Laws of 1907, in addition to creating the Long Sault Development Company as a private stock corporation, carries a grant of the right, more accurately the privilege, to erect across the river at the foot of this rapid, a dam and works for the development of hydraulic power. The act further provides that, after receiving proper authority from Congress, the company may have, on application therefor, a formal grant of title to the bed of the river to the extent to be covered by the structures to be erected and by the waters to be impounded and the Commissioners of the Land Office are commanded to make such conveyance. Not only the charter but the privileges

granted were unlimited as to time. Up to 1907 the State had never granted its title to these lands under water, nor the privileges named. While the act of the State Legislature was ineffectual alone to confer the right to do the things named, because the consent of Congress and Great Britain in the case of navigable and international boundary waters was necessary, the consent of the State of New York was essential to the full right to carry out the enterprise because, as stated in the opinion of Henry W. Taft, Esq., obtained by the Long Sault Company, the State, except as it may have made grants thereof, is proprietor of the bed of the stream at this point from the shore to the State boundary line and entitled to the hydraulic utilities of the water as against its own grantees of the adjacent uplands. The location involved is not within the bounds of any city or village.

The grant of the privileges described and the provision for conveyance of the title of the bed of the river was void because the location was embraced within the forest preserve.

The State Legislature, by chapter 332 of Laws of 1893, enacted article VI of chapter 43 of the General Laws, which provided as follows:

> "Section 100. The Forest Preserve. The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of * * * St. Lawrence * * * except—
>
> "1. Lands within the limits of any village or city, and
>
> "2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the

commissioners for loaning certain moneys of the United States, usually called the United States deposit fund."

"Section 102. Powers and Duties. The forest commission shall:

"1. Have the care, custody, control and superintendence of the forest preserve. * * *."

That statute was in force when the present Constitution was adopted, whereby the lands within the forest preserve were made inalienable. That Constitution, adopted in 1894, became effective by its own terms on January 1, 1895, and contained the following clause:

"Article VII. Section 7. The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

In the case of *People* v. *Fisher,* 190 N. Y. page 480, the court, referring to the definition of forest preserve lands as contained in section 100 of the act of 1893, above quoted, said:

"The language of the statute thus specifying the lands which are included within the forest preserve is clear and definite and does not in itself require construction. Its plain and positive language is made even more certain by the fact that some exceptions are stated therein."

It should be unnecessary here to discuss the question of whether the hydraulic use, described in the grant, to be made of these lands, would be in contravention of the constitutional provision cited, for

the opinion of Mr. Taft contains the following concession which is, beyond doubt, a sound statement of the law:

> "If the land under the St. Lawrence river had been a part of the forest preserve it would have been a violation of the constitutional provision for the state to grant permission to a private or municipal corporation to erect dams, piers, bridges or other structures which would permanently occupy any portion of the land under water, for such permission would be inconsistent with the injunction that such land should not be leased and in direct contravention of the provision that it should not be taken by any corporation."

The forest preserve may not be used by railroads:

> *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225.
>
> *Adirondack Ry. Co.* v. *Indian River Co.*, 27 App. Div. 326.

The question then is whether this land under water was within the forest preserve.

At the time of the making of the grant, this land was property of the State for it had never been granted, and this seems to be conceded. St. Lawrence county is described as follows (State Law):

> "Section 5. Canadian boundary line. The boundary line between the state of New York and Canada is as follows * * *; thence turning westerly and passing around the southern and western side of said (Cornwall) island, keeping one hundred yards distant therefrom and following the curvatures of the shore to a point opposite to the north-west corner or angle of said island; thence to and along the middle of the main river until it

approaches the eastern extremity of Barnhart's island; thence northerly along the channel which divides the last mentioned island from the Canadian shore, keeping 100 yards distant from the island, until it approaches Sheiks island; thence along the middle of the strait which divides Barnhart's and Sheiks islands to the channel called the Long Sault, which separates the two last mentioned islands from the Lower Long Sault island; thence westerly (crossing the center of the last mentioned channel) until it approaches within 100 yards of the north shore of the Lower Sault island; thence up the north branch of the river, keeping to the north of and near the Lower Sault island; and also north of and near the Upper Sault, sometimes called Baxter's Island, and south of the two small islands marked on the map "a" and "b," to the westerly extremity of the Upper Sault or Baxter's island; thence past and between the two islands called "The Cats" to the middle of the river above; thence along the middle of the river, keeping to the north of the small islands marked "c" and "d" * * *."

The National, the State and county boundary at this point are identical. The bed of the St. Lawrence at the Long Sault, being in St. Lawrence county, was then, to the breadth thereof, between the National, State and county boundary line on the north and the shore of the river on the south, embraced within the forest preserve by sheer force of this definition of the preserve.

In the sixteen years which have followed the adoption of this definition, no grants of land under the water of the St. Lawrence have been made either by special act or by the Land Board, except that in 1909 the Commissioners of the Land Office conveyed a strip of eight and fifty-eight hundredths

acres, lying in the village of Waddington, to the Norwood and St. Lawrence R. R. Co., but that land, by reason of its being within a village, was not within the forest preserve. For the same reason, two Land Board grants, underlying Lake Champlain, in forest preserve counties, and made since 1895, did not affect the forest preserve. The consistent respect thus paid to the forest preserve section of the Constitution, as applied to Lake Champlain and the St. Lawrence river, is quite significant, especially when compared with the scant respect for it manifested in so many ways and other places and for many years after 1895.

Certain grants, made since January 1, 1895, of lands under the Mohawk and the upper Hudson, may be open to question under this clause. Two grants under the Hudson, lying within Warren and Saratoga counties, are at points far up that river, and higher up perhaps than the Hudson has ever been navigable or publicly used for that purpose. If such is the case, the rule applied lower down the Mohawk and the Hudson, viz.: that the bed does not pass with a grant of the upland, would not apply, and the bed would not have become part of the forest preserve. One grant of land under the Mohawk in Saratoga county at Niskayuna by special bill and three affecting the Hudson in Saratoga county, between Half Moon and Schaghticoke, made since 1895, are presumably void under both sections of the Constitution herein considered, but in each of those cases on the Hudson an issue may be raised as to whether that reach of the channel lies below the up-stream limits of navigation. But no element of doubt, dependent on any such question of fact, is presented by the St. Lawrence grant at the Long Sault. It is not surprising, however,

if, in dealing with these points on the Mohawk and Hudson, so near large industrial centers, consideration of the forest preserve clause of the Constitution may have been neglected by the Legislature.

Chapter 484, Laws of 1896, in authorizing the St. Lawrence Power Company to divert the water of the river by a raceway to the village of Massena, sought to create a privilege, in the river flow, to the extent of a fraction thereof and probably violated this section, but that act contained no grant of title to the river bed nor, by necessary construction of terms, of any privilege to occupy any part of the bed with structures, since water may be diverted by mere tapping of a stream.

Before the adoption, in 1895, of the Constitution, the St. Lawrence had been expressly dedicated by the Legislature to the free use of all the public as a pleasure resort and steps had been taken to preserve it for that purpose and were continued by legislation immediately following the adoption of the present Constitution. Chapter 802 of the Laws of 1896, described the reservation by the following language:

> "Section 1. All that part of the river St. Lawrence lying and being within the state of New York, with the islands therein, is hereby constituted an international park which shall be known as 'The State Reservation on the St. Lawrence.'"
>
> "Section 2. The said state reservation on the St. Lawrence shall be under the control and management of the board of fisheries, game and forests, who shall have the power to make and enforce ordinances, by-laws, rules and regulations for the management of the property of the state within the borders of said reservation * * *."

> "Section 3. It shall be the duty of the said board of fisheries, game and forests to report to the next legislature of this state what laws in their opinion should be enacted for the government and control of said state reservation so as to make the same the most useful to the people of the state as a part of the international park upon the St. Lawrence river, comprising the whole of said river."

In the year 1900, by chapter 20, the name of the reservation was changed by the following:

> "Section 218. The St. Lawrence Reservation. All that part of the river St. Lawrence lying and being within the state, with the islands therein, and such lands along the shore thereof as are now owned by, or shall hereafter be acquired by, the state, is hereby constituted a park which shall be known as 'The St. Lawrence Reservation.'"

Subsequently, by several enactments, the Legislature made appropriations for the erecting by the State itself of docks, necessary to enjoyment by the public of the St. Lawrence for boating. The erecting of these docks by the State was in strict accord with the requirement of the Constitution which would have forbidden accomplishment of the same end under grants of privileges made to any person or to any corporation, public or private, to erect docks within the forest preserve.

The definition of the forest preserve as "the lands now owned or hereafter acquired by the state," requires that the term "lands" should be construed, as is usual in case of large tracts, to include waters. No construction of this word in this context which excludes water surfaces could stand the test of reason. While the engrossing thought of the people, in creating the forest preserve was the protecting

and preserving of the forests as important factors in water supply, it would have been impracticable to define an extensive, State-owned forest preserve to include wild timbered land of the Adirondacks and, at the same time, exempt innumerable water surfaces, and there was no reason for the attempt. Nor was there any purpose to exclude other large surfaces which never did and perhaps never could sustain a forest growth. The Adirondacks contain large areas of natural meadow as well as rocky surfaces where forests never did and perhaps never could take root. These mountains contain many lakes which could not bear a forest growth but that those areas were not to be included in the forest preserve, is not contended.

The clause "the lands * * * shall be forever kept as wild forest lands" must of course relate only to so much of the whole forest preserve as sustains or may sustain a forest growth. But that language does not permit the inference that surfaces devoid of trees were for that reason outside the protection of the clause forbidding leases and sales.

The St. Lawrence river is not within the Adirondack Park, but that park does not embrace all the area covered by the constitutional definition of the forest preserve, and there was no reason why it should. While that park was created before the Constitution of 1895 was adopted, the purpose in creating it was to define an area within which it would be most advantageous for the State to confine its future purchases of additional mountain lands and to facilitate effective administration of rules for the enjoyment of that wild land and for the protection of the more valuable forest growth possessed by the State. Lands belonging to or ac-

quired by the State lying outside this park, but in forest preserve counties, have been, since January 1, 1895, as inalienable, if lying outside of cities or villages, as any tracts inside the bounds of the park.

The inflexible terms of the Constitution, respecting use of the forest preserve, have already presented many difficulties and have been the cause of legitimate regret, but it is conceded that the only remedy for that is by amendment of the instrument. Mr. Taft practically concedes that the letter of the Constitution is fatal to the Long Sault grant, so the question is stated as one of intent of the definition of "forest preserve" to be resolved by inferences drawn from external considerations.

No constitutional injunction ever arose out of a determination, stronger than that in this case and which was to preserve natural conditions in the forest preserve against the inroads of commerce. It must be assumed here that every exception, intended to be made, was expressly stated in the statute. It is contended that the letter should yield to a construction opposed to the letter and followed for years by State departments. But in this case, the practice, as to grants of hydraulic privileges, coupled with title to lands under water, has accorded with the letter with no exception, in case of the St. Lawrence, until this grant was made twelve years after this section was adopted. When it is considered that this grant vests in a private monopoly for all time, practically all the power of the St Lawrence river, a power equal to the aggregate permanent power now developed within this State, it is beyond belief that the courts would do violence to the letter and to the practical construction put upon this clause by State departments as to grants of land under this river, in order to save

this grant where a property loss of such magnitude would fall upon the present and all future generations.

That the St. Lawrence river is not open to hydraulic developments under State privileges at the Long Sault, where nearly all its fall adjacent to the State is concentrated, by a private company, may be a newly discovered cause for regret by some, but the Constitution prevents disposition of this part of the forest preserve as effectively as it does the sale of timber, felled either by the elements or by the act of a trespasser. It is for the latter reason that much timber in the forest preserve now goes to waste. Even if neither of these consequences were within the spirit of the constitutional prohibition, it remains true that this section has thus far been construed with deference to its plain language and regardless of considerations of inconvenience and of apparent injury to public interest as seen from certain points of view but all of less importance than is the observance of the behests of the Constitution.

So far as the legislative act of 1907 made a grant of a privilege to a private corporation to enjoy an exclusive occupation of the St. Lawrence river for private purposes and made provision for conveyance of title of the bed thereunder, it was void, because in contravention of section eighteen of article three of the Constitution.

Section 18 of article three of the Constitution reads as follows:

> "The legislature shall not pass a private or local bill in any of the following cases: * * *. Granting to any private corporation, associa-

tion or individual any exclusive privilege, immunity or franchise whatever."

The act of 1907 does not require the Long Sault Company in the prosecution of its business to serve the public. While the title of the act recites a purpose to improve navigation, the act prescribes the nature of the structures and the operation thereof only by saying that the same shall not render the stream less navigable than it is in its natural condition. It is not, therefore, an act which secures any improvement of navigation. That Congress may require, if it ever acts, structures which will necessarily improve navigation, such Congressional action could not render this State statute, one of a public nature on the theory that a purpose to improve navigation gives public character to a statute. The withholding by the Legislature of any power of condemnation for acquiring the extensive upland in New York necessary for pondage, is of itself evidence that the bill was treated by the Legislature as authorizing uses of the river which would be deemed private. Structures completely damming the river, are, to the extent of the State's jurisdiction, permitted by the act. While the height of the dam is not stated, the amount of power available for development and which under the act, may be developed, as would appear from its terms, is so great as to indicate that structures are authorized by which the river for many miles above would be impounded. The grant itself implies that the State will make no grants for occupations of the river, by others, under which full enjoyment by this company of so much of the river as is occupied by its structures and pondage, and of the hydraulic head developed thereby would be impaired. On this point particularly, I must differ with Mr. Taft.

This public river is, to the extent pointed out, granted to the Long Sault Company exclusively and for a physical occupation of such character as would prevent, within the area of that occupation any other occupation thereof for similar purposes by others. In applying for Congressional legislation, this company very truly contended, in a hearing before the rivers and harbors committee of the late Congress, that under this grant New York had given absolutely all her right and title to the power utilities of this public river at the Long Sault to this company.

In 1841, Senator Verplank, speaking for the Court of Errors, said that a privilege to dam a public stream for private use was a franchise.

> *Canal Commissioners* v. *Kempshall,* 26 Wend, 423.

This provision of Sec. 18, Art. 3 of the Constitution was not inserted until 1874 and took effect January 1, 1875. Since that time, so far as careful research shows, no case has arisen in the courts directly involving the question of whether a grant by special or local bill to a private corporation of a privilege to completely dam a public stream and enjoy the whole power therefrom, would be valid. There is no doubt, however, that this grant was made by a local bill for a legislative bill for the building of a bridge at a particular place; for the waiving of an escheat of a particular piece of land or granting a franchise to construct a tube railway under a particular street, is deemed to be a local bill.

> *People* v. *Supervisors of Chautauqua,* 43 N. Y. 10.
>
> *Johnston* v. *Spicer,* 107 N. Y. 201.
>
> *Astor* v. *Arcade Railway Co.,* 113 N. Y. 93.

The act of 1907 is also to be deemed a private bill for it relates only to a particular corporation organized for private gain, to be controlled by private stockholders.

Economic Power Co. v. *City of Buffalo,* 195 N. Y. 295.

What constitutes an exclusive privilege or franchise under this clause of the Constitution, if not settled, has been discussed in the higher courts. The right to lay a tube railway under a particular street, according to the opinion of four judges, constitutes an exclusive privilege. *Astor* v. *The Arcade Railway Co., supra.* The right to physically occupy a public street with a railroad track is an exclusive privilege. *Perkins* v. *Heert,* 158 N. Y. 311. It was held in the *Matter of The Union Ferry Co.,* 98 N. Y. 139, that this prohibition was aimed against the granting to corporations or individuals of privileges whereby they might exclude others from the exercise of like privileges or franchises and therefore that a legislative act which does not by its terms provide for such exclusion, is not within the prohibition. But that case involved a ferry franchise. A ferry line is not, so far as use of water goes, necessarily exclusive for there might be many ferry lines between the same termini and many ferry lines with independent termini between the same cities and crossing courses in the same waters. The enforcement of an exclusive ferry privilege would require the aid of a court proceeding under the warrant of an express statute making the privilege exclusive. The occupation of the St. Lawrence river by a private dam extending across the channel and by pondage, would be neces-

sarily exclusive because physical and fixed, and, if authorized, constitute an exclusive hydraulic privilege even though the granting statute omitted in terms to so define the privilege. No court injunction could aid in making such exclusiveness any more real except as against trespassers. The reasoning accompanying the expression of views on this point, in the opinion in the Astor and Perkins cases, *supra,* is along this line. If a grant is exclusive only when the act in terms says so, then all the power of our public waters could be granted to one person by special act for, while the grant would be exclusive in its operation, the exclusiveness could be blamed on nature in not having provided more power. The presence of words, openly confessing an intent to violate the Constitution, may prove invalidity, but absence thereof ought not to be conclusive of validity of a statute. *In re Gilbert* v. *Elevated R. R. Co.,* 70 N. Y. 361, the court recognizes the difficulty of laying down in advance, any definition inclusive of all cases of exclusive privileges. The courts, however, have declared what one of the purposes was which moved the people to adopt this provision of the Constitution. Judge CHURCH says, in *Matter of N. Y. El. R. R. Co.,* 70 N. Y. 349, that the object of requiring that an exclusive privilege or franchise should only be acquired by a private corporation under general laws, was for the purpose of removing from the Legislature the presence of that corrupting influence which accompanies direct application to the Legislature for the bestowal of valuable privileges.

In apparent obedience to that understanding of the intent of this provision, the Legislature enacted by section 270 of the General Highway Law, that a

ferry privilege may be acquired by a private person or private corporation by application to the county court of the county. An early example of such a general law bestowing dam privileges is shown in chapter 47 of the Laws of 1813. It provided, for the benefit of all owners of riparian land adjoining many interior public streams, that, on pursuing certain methods of construction of dams whereby locks or bi-passes should be provided for navigation, hydraulic improvements might be made at sites thereon available for power developments. But no general law had, however, up to 1907, been enacted under which a privilege for damming either the St. Lawrence or Niagara for private profit might be secured by private companies. The Long Sault Company took this grant by private act, because there was no general law under which the company could acquire the desired privileges. Our statute books show that nearly all of the power sites upon interior public streams were occupied by private developments under the authority of special acts which were not forbidden until 1875. Over 175 such special acts were passed prior to 1853, leaving but a few power sites on public streams to which later acts could apply. There was slight occasion thereafter for local or private acts, and still less occasion after 1875 for acts which attempted to convey privileges of this character. In 1875 there remained, ungranted by the State, the whole power of the St. Lawrence and Niagara rivers. It is reasonable to believe that this clause of the Constitution, since privileges to dam public streams comes within its terms, was intended to require that no developments in those two great rivers should ever become the subject of private acts, when those privileges were of such incalcul-

able value. That special legislative grants have been made covering Niagara power, void under this prohibition, may be true, but those grants are distinguishable from this grant of St. Lawrence power in that many, if not all of them, contained conditions exacting service to the public by way of supplying potable water; sewer facilities and, in one case, in the lighting, without charge, of the State Reservation at Niagara. Each Niagara grant, moreover, covered a part only of the State water forming that cataract, and none was, as to the whole power of the falls, under State jurisdiction, exclusive. In face of the words "any exclusive privilege whatever," the courts would not seek fine distinctions as to what were exclusive privileges. There appears no good reason for doubting that the courts, if invoked in a proper case, would enforce this prohibition of the Constitution as to the method of making grants and condemn this grant which comes so clearly within the letter and the spirit of the prohibition of the section cited.

THE REPEALING BILL.

Neither Congress nor the Canadian authorities having as yet authorized this invasion of the St. Lawrence river, no step has, of course, yet been taken by the company which would have furnished a foundation for any suit or proceeding in behalf of the State whereby the validity of this grant of privileges in public waters could have been brought before the courts for adjudication. Such private lands within the State as the company desired to acquire have been purchased by private contract from willing sellers. The company cannot ask the Land Board for a formal grant of the land under

water until after Congress shall have consented to this work and a long time may elapse before such Congressional consent is, if ever, given. In the meantime, no court proceeding being possible, the Legislature alone is in a position to disaffirm by any step in behalf of the State, the validity of this grant.

A repealing act, in such a case, would not be new in practice. A grant made by legislative act, deemed by a subsequent Legislature to be in conflict with the Constitution, was repealed in case of a grant of lands under public waters, made under chapter 864 of the Laws of 1868. The repealing act was chapter 257 of the Laws of 1875, and the facts involved were very similar to those presented in the case of the Long Sault grant. That repealing act was before the courts in the case of *Coxe* v. *The State,* 144 N. Y. 862. In that case as in this, a remedy was afforded the grantee for the recovery of moneys paid out on the assumption that the grant was valid.

CONCLUSION.

I am of opinion that chapter 355 of the Laws of 1907, so far as it grants the privileges described, to this private corporation, and in so far as it provides that a grant of the land under the waters of the St. Lawrence shall be made to this company upon application to the Commissioners of the Land Office, is invalid under the two sections of the Constitution cited.

GEORGE P. DECKER.

May, 1911.